UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

THE NEW COLEMAN PARK Employer [1] and NEW ENGLAND HELTH CARE EMPLOYEES UNION, DISTRICT 1199,SEIU, AFL-CIO Petitioner and LOCAL 1522 OF COUNCIL 4, AFSCME, AFL-CIO Intervenor	Case No. 34-RC-2113

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record [2] in this proceeding, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

[1] The Employer's name appears as stipulated at the hearing.

[2] The Petitioner's and Employer's unopposed motions to correct the transcript are hereby granted.

The Petitioner seeks to represent a unit of approximately 16 to 20 technical employees at The New Coleman Park, including licensed practical nurses (LPNs) and therapeutic recreation directors (TRDs). The Employer and Intervenor claim that no question concerning representation exists because (1) the Petitioner waived its right to file a petition to represent the LPNs, and (2) the LPNs have been accreted to an existing bargaining unit at two other facilities, Bridgeport Health Care Center and Bridgeport Manor, and that a current collective bargaining agreement covering those two facilities serves to bar an election at this time. The Employer and Intervenor further contend that if an election is directed in the petitioned-for unit, the lone non-supervisory TRD should be excluded.

For the reasons noted below, I find that the Petitioner has not waived its right to file the instant petition, and that the Employer and the Intervenor have failed to rebut the presumption that a single facility unit at The New Coleman Park is appropriate. Accordingly, the petitioned-for employees cannot constitute an accretion to another unit, and there is no contract bar to an election. However, because there is insufficient record evidence to determine whether the lone non-supervisory TRD is a technical employee, I shall permit her to vote subject to challenge in the election directed herein.

1. Facts

A. Background

The New Coleman Park (herein called New Coleman Park) is a 90-bed skilled nursing facility located in Bridgeport, Connecticut. It is owned and operated by Bridgeport Health Care Center, Inc. (herein called BHHC, Inc.). New Coleman Park was purchased by BHHC, Inc. in November 2004, along with another skilled nursing facility, Rose Garden, located in Waterbury, Connecticut. At the time of the purchase, New Coleman Park and Rose Garden were both under State receivership. At the time of the purchase, the Petitioner was recognized by Rose Garden as the exclusive bargaining representative of its service and maintenance employees. However, there was no history of collective bargaining at New Coleman Park at the time of the purchase.

BHHC, Inc. also owns and operates Bridgeport Health Care Center and Bridgeport Manor, skilled nursing facilities in Bridgeport with a total of 540 beds located about 2 ½-3 miles from New Coleman Park. When Bridgeport Health Care Center and Bridgeport Manor were purchased by BHHC, Inc. from the City of Bridgeport, the two buildings had been considered a single facility known as the Dinan Center. The Dinan Center had been party to city-wide collective bargaining involving five different unions. After the purchase, the former Dinan Center was separated from the city-wide units, and three separate bargaining units were formed covering both Bridgeport Health Care Center and Bridgeport Manor. The Intervenor represents a unit of all service and maintenance employees and LPNs covering both facilities, herein called the BHHC Unit, which is the unit to which the Employer and Intervenor claim that the petitioned-for LPNs have been accreted. The Petitioner represents a unit of clerical and technical employees and a separate unit of RN's at both facilities.

B. Centralized Operations

Certain operations applicable to all four facilities owned by BHHC, Inc. are centralized in a main office located at Bridgeport Health Care Center. This includes all business operations, such as patient admissions, purchasing, accounts receivable, accounts payable, Medicare and Medicaid billing, as well as human resource operations, such as hiring, payroll and benefits administration, and collective bargaining.[3] Each facility's time clock for employees is wired into the same system, as are all computers. The Employer's principal owners, Chaim Stern and William Neuman, have their offices at the main office. The record also establishes that skilled maintenance employees located at Bridgeport Health Care Center perform work at all four facilities when the local maintenance employees are unable to perform the required tasks.

The Dietary, Physical Therapy, Social Services, Maintenance, and Housekeeping departments each have a department head, who is responsible

[3] As a result of this centralization of operations, the previously existing business office at New Coleman Park was eliminated. However, one individual remains at New Coleman Park to answer employee questions, and to resolve payroll and benefit issues. That individual will contact the main office if he or she is unable to resolve the problem locally.

for all four facilities, located in the main office at Bridgeport Health Care Center. As a result, each of these department heads routinely travel to all four facilities. Each of these departments also have local supervisors at each facility who are responsible for overseeing the day-to-day work of the employees assigned to their department. There is not, however, a common director for the Recreation department. As a result, New Coleman Park has its own Recreation Director, Pamela Bing, who is a TRD, and who supervises the department at New Coleman Park, which includes the lone other TRD, Paula Chavez.

As noted above, the hiring process is centralized at the main office at Bridgeport Health Care Center. Thus, all potential hiring must be initially cleared and approved through the main office prior to any employee interviews. However, the interviews are done at each facility by the department heads, whose recommendations are routinely followed by Stern. The decision to fire employees must also be approved by the main office.

C. New Coleman Park Operations

Each facility, by state law, must have its own separate Administrator, Director of Nursing, and Medical Director. The Administrator for New Coleman Park is John Farling, who had been retained from the prior owner. Cheryl Lampore is the Director of Nursing at New Coleman Park. She had been the Assistant Director of Nursing at Bridgeport Health Care Center, before being transferred to New Coleman Park. The record does not identify the Medical Director.

In sharp contrast to the commonly directed departments described above, the nursing departments do not share common directors. As a result, Director of Nursing Lampore is responsible for the overall nursing care at New Coleman Park, and has no responsibilities at any other facility. As department head, she is responsible for all interviews of prospective Nursing Department employees, and effectively recommends hiring to the main office. RN supervisors are responsible for the day-to-day direction and discipline of employees in the Nursing Department. With one possible exception, the RN supervisors have no

responsibilities at the other facilities.[4] All LPN scheduling and in-service training is done at New Coleman Park.

The record establishes that three RN's were transferred from Bridgeport Health Care Center to fill positions at New Coleman Park. Parichith Khamhoung had been an RN floor nurse at Bridgeport Health Care Center, and became an RN supervisor at New Coleman Park. Martha Krankel had been an RN supervisor and unit manager at Bridgeport Health Care Center, and became an RN supervisor at New Coleman Park. RN Barbara Scarpa transferred from an unidentified position at Bridgeport Health Care Center to become the Infection Control Nurse at New Coleman Park. They all work full-time at New Coleman Park, and have no continuing responsibilities at Bridgeport Health Care Center. In addition, RN Supervisor Ken Gilbert was temporarily transferred from New Coleman Park to Bridgeport Health Care Center for one week when RN Supervisor Martha Frankel began working at New Coleman Park. There is no other evidence of any interchange of RN's between New Coleman Park and the other facilities.

With regard to the interchange of employees who are in the petitioned-for unit, the record establishes that five full-time LPNs at Bridgeport Health Care Center also work part-time as LPNs at New Coleman Park. One of them, James Ebron, who has been a Bridgeport Health Care Center employee for over eleven years, began working at New Coleman Park prior to its sale to BHHC, Inc. The record does not reveal when the other four LPNs began working at New Coleman Park. They are paid separately by each facility, receive separate W-2's, and are not paid overtime for the hours they work at New Coleman Park.[5]

Stern generally testified that unidentified "nursing employees" routinely perform their work at Bridgeport Health Care Center, Bridgeport Manor, and New Coleman Park. When pressed for details on cross-examination, Stern testified

[4] Stern testified that an unidentified RN works 3 days at New Coleman Park, and 2-3 days at Bridgeport Health Care Center. The testimony with regard to all nurses named in the record is contrary to this vague testimony. The Employer offered no other testimony or records to corroborate or clarify Stern's claim.

[5] No party is contesting the inclusion of these LPNs in the petitioned-for unit.

that on about 15 occasions "during the course of the period that we took over," he paid for cars to bring employees from Bridgeport Health Care Center to New Coleman Park. While claiming that LPNs were involved in such interchange, he could not provide any names or details. The Employer's attorney stated at the hearing that he had documents to establish this interchange, but declined to produce such documents for the record. Several LPNs testified at the hearing that they were unaware of any such interchange.

D. The alleged waiver to file the instant petition

Shortly after the Employer began operations at New Coleman Park, the Intervenor, which had been engaged in organizing activities at the facility, claimed that the service and maintenance employees and LPNs should be accreted to the BHHC Unit. The Employer declined until the first week of January 2005. On January 13 the Employer's attorney sent a letter to the Intervenor offering to recognize the Intervenor "on the condition that the unit mirror that represented by Local 1522 at Bridgeport Health Care Center, both as to scope, classifications covered, and unit inclusion standards." The Intervenor accepted the Employer's conditions, and requested that the Employer contact the Intervenor "to finalize an agreement on recognition of Local 1522." Meanwhile, and apparently before any such agreement was finalized, Petitioner filed a petition in Case No. 34-RC-2106 on January 21, 2005, seeking to represent a unit of service and maintenance employees employed by the Employer at New Coleman Park. The LPNs were not specifically included in that petition. The Employer and the Intervenor initially took the position that the service and maintenance employees, as well as the LPNs , had already been accreted to the BHHC unit.

A representation hearing was scheduled for February 1, 2005 regarding that petition. Prior to the start of the hearing, the Employer's attorney, Michael Devlin, asked to speak with Petitioner's attorney, Kevin Creane, in the hallway. Intervenor representatives Kevin Murphy and Thomas Fascio**,** and Petitioner representative Suzanne Clark, were also present. The Employer and Intervenor proposed that they would not contest the validity of the petition if the Petitioner

agreed to allow the Intervenor on the ballot, and the Petitioner agreed. Devlin asserted during this conversation that they were not waiving the right to argue that they were allowed to accrete employees other than those in the petition, and "probably" mentioned the LPNs specifically. Creane joked in response that the Petitioner would be willing to talk at any point about accreting the RN's into Petitioner's RN unit at Bridgeport Health Care Center. It is undisputed that further conversations took place throughout the day as the parties attempted to identify which positions belonged in the service and maintenance unit. It was during those conversations in the hallway outside the hearing room that the Employer and Intervenor claim that the Petitioner agreed to allow them to accrete the LPNs to the BHHC unit, and thereby waived its right to file the instant petition. Petitioner denies that any such agreement or waiver was made.

Murphy testified that in one of those conversations between himself, Fascio, Devlin, Devlin's unnamed associate and Creane, someone indicated to Creane that the accretion of the LPNs was moving forward. Creane allegedly responded that he was aware of that fact, but that Petitioner did not have any organizing drive for the LPNs. Murphy testified that as a result of what took place in the hallway that day, the Employer and Intervenor moved forward with the accretion. He recalled that the Employer's principal owners, Neuman and Stern, and Petitioner representative Clark, were in the hallway at the time.

Neuman and Stern gave slightly different testimony than Murphy. Both testified that they overheard a conversation between Murphy and Creane, with Clark and Fascio present. Stern claimed that Murphy said to Creane and Clark that, "so the accretion for the LPNs is standing, and then you're not objecting to that," and that Creane responded yes. Neuman testified that he heard Murphy say to Creane, "does this mean that you will not go against the accretion of the LPNs, and as far as you know not presently organizing the LPNs, and Creane said yes."

Neither Fascio nor Devlin testified about this conversation. Creane and Clark testified that Creane never indicated that the Petitioner was not organizing among the LPNs, and never agreed to the accretion of the LPNs to the BHHC

unit. Both testified that, in a conversation involving a Board Agent, Devlin, an unnamed associate of Devlin, Murphy, Fascio, Clark and himself in the hall, the Board agent was going through the job classifications that she understood the parties to have agreed would be included, and possible exclusions. Murphy asked "what about the LPNs," and either the Board agent or Devlin said they were not in the petition. Creane then said that was correct, that the Union was not petitioning for the LPNs at that point, but that did not mean they were waiving the right to petition for them at some later time. Clark essentially corroborated Creane's testimony.

E. Extension of the BHHC Unit Contract to the LPNs at New Coleman Park

Devlin subsequently sent a letter dated February 4 to the Intervenor, stating "the accretion at the above facility was unchallenged as to the LPNs," and requesting that the parties soon meet "to discuss the seamless transition of this category of employees." About a week after the scheduled hearing in 34-RC-2106, the Employer began to apply the contract covering the BHHC Unit to the LPNs at New Coleman Park. In the first week of February, Stern and Neuman held meetings at New Coleman Park with the LPNs, informing them that they would be getting new wages and better benefits. Stern claimed that he informed the LPNs that they could pick up shifts at Bridgeport Health Care Center and Bridgeport Manor, but none of the LPNs who testified recalled such a statement being made. About February 8, the Intervenor conducted meetings with the LPNs at New Coleman Park, and distributed a letter to them informing them of "a new agreement with Coleman Park to include you effective immediately into AFCME Local 1522's contract with Bridgeport Health Care."

2. Conclusions

A. The Alleged Waiver

Although the Board will enforce a promise by a union not to represent certain employees, that promise must be express, for a reasonable period of time, and the result of bargaining between equals. *Lexington House*, 328 NLRB 894, 897 (1999); *Briggs Indiana*, 63 NLRB 1270, 1272 (1945). In this regard, the

Board recently reiterated in *Women and Infants' Hospital of Rhode Island,* 333 NLRB 479 (2001), the long-standing principle set forth in *Cessna Aircraft Co*., 123 NLRB 856 (1959), that any promise by a union not to seek representation must be express, because any such promise is a limitation upon the rights of employees.

In the instant case, there is insufficient record evidence to establish that the Petitioner expressly promised not to seek to represent the LPNs at New Coleman Park. Even viewed in the light most favorable to the Employer and Intervenor, the evidence shows that no express promise was made, certainly no promise for a reasonable period of time, and that the alleged statement was not the result of bargaining. Indeed, all parties agree that the conversations in the hall where the waiver allegedly was uttered occurred after the parties had reached an agreement to go forward with an election in the service and maintenance unit that included the Intervenor on the ballot. No one testified that the purported waiver came as the result of bargaining. While Newman and Stern, who were non-participants in the conversation, testified that Creane stated that Petitioner would not object to the accretion, even their testimony, unsupported by any of the actual participants in the conversations, does not contain any express promise not to seek to represent the LPNs for a reasonable period of time. Accordingly, I shall deny the request to dismiss the petition based upon an alleged waiver by Petitioner to represent the LPNs at New Coleman Park.

B. <u>The alleged accretion and contract bar</u>

It is well established that an existing contract will bar an election among a group of employees who have been accreted to an existing bargaining unit. *Firestone Synthetic Fibers Co*., 171 NLRB 1121 (1968). However, the Board follows a restrictive policy in finding accretion because its application forecloses the employees' basic right to select their own collective bargaining representative*. Passavant Retirement and Health Center*, 313 NLRB 1216 (1994); *Melbet Jewelry Co*., 180 NLRB 107 (1970). Moreover, "it is well settled that the doctrine of accretion will not be applied where the employee group

sought to be added to an established bargaining unit is so composed that it may separately constitute an appropriate bargaining unit." *Hershey Foods Corp*. 208 NLRB 452, 458 (1974).

In the instant case, the Petitioner seeks to represent a unit of all technical employees limited to the New Coleman Park facility. The Board has a longstanding presumption that a single facility unit is appropriate. *Cargill, Inc.*, 336 NLRB 1114 (2001); *J&L Plate, Inc.*, 310 NLRB 429 (1993). That presumption equally applies to the health care industry. *Manor Healthcare Corp*., 285 NLRB 224, 225 (1987). Thus, in order to find an accretion in the instant case, the Employer and the Intervenor must first overcome the presumptive appropriateness of the single facility unit of technical employees at New Coleman Park sought by the Petitioner. The presumption may only be overcome by showing a functional integration so substantial as to negate the separate identity of the technical employees at New Coleman Park. *Cargill, Inc.*, supra; *J&L Plate, Inc.*, supra. In deciding that issue, the Board considers such factors as centralized control over daily operations and labor relations, including the extent of local autonomy; skills and functions of the employees; general working conditions; bargaining history; employee interchange; and the geographical location of the facilities in relation to one another. Id. However, separate daily supervision and the absence of significant interchange are key factors in finding that the single facility presumption has not been rebutted. *Passavant Retirement and Health Center*, supra; *Towne Ford Sales*, 270 NLRB 311 (1984), affd. sub nom. *Machinists Local 1414 v NLRB*, 759 F.2d 1477 (9th Cir. 1985).

I find that the evidence proffered by the Employer and the Intervenor is insufficient to rebut the presumptive appropriateness of the single facility unit sought by the Petitioner. In this regard, I note that the LPNs at New Coleman Park are subject to separate supervision, training, and scheduling, and that the nursing department at New Coleman Park has significant local autonomy from the other facilities operated by BHHC, Inc. I also note the distinct geographical separation of New Coleman Park from the Bridgeport Health Care Center and Bridgeport Manor.

The evidence of interchange between the LPNs and the BHHC Unit does not rise to the level of significance necessary to rebut the single facility presumption. In this regard, despite Stern's general claim that on 15 occasions he authorized the temporary reassignment of "nursing employees" between New Coleman Park and the BHHC Unit, the Employer specifically declined to produce documentation to support this claim. Under such circumstances, the record does not enable me to ascertain the nature and extent of the alleged temporary transfer of employees between New Coleman Park and the BHHC Unit, how many LPNs may have been involved in such transfers, and when and under what circumstances they occurred. See *O'Brien Memorial, Inc.*, 308 NLRB 553 (1992).

Thus, the only reliable evidence of interchange is that five full-time LPNs in the BHHC Unit also hold part-time LPN positions at New Coleman Park. The weight to be given this evidence of interchange is significantly diminished because all five of these LPNs are separately employed by each facility, have separate supervision at each facility, are separately scheduled at each facility, are separately trained at each facility, and experience no interchange between their positions at each facility.

While certain other factors exist that arguably rebut the single facility presumption, including the centralization of business operations and labor relations, and the similarity of skills between the LPNs in the BHHC Unit and those employed at New Coleman Park, such factors are insufficient to overcome the presumption in light of the separate supervision, extent of local autonomy, geographical separation, and lack of significant interchange noted above. Although the LPNs at New Coleman Park now share the same wages, benefits, and other terms and conditions of employment as the LPNs in the BHHC Unit, this only went into effect shortly before the hearing in the instant case when the Employer and Intervenor agreed to apply the contract covering the BHHC Unit to the LPNs at New Coleman Park.

The regular interchange and work-related contacts between the skilled maintenance employees in the BHHC Unit and the service and maintenance employees at New Coleman Park does not negate the appropriateness of the

petitioned-for single facility unit. In this regard, I note that pursuant to the election agreement in Case No. 34-RC-2106, the Petitioner was certified as the representative of the service and maintenance employees at New Coleman Park on March 9, 2005. The fact that all the parties ultimately agreed to the appropriateness of a unit of service and maintenance employees limited to the New Coleman Park facility, even though they work closely and under the same supervision as the service and maintenance employees in the BHHC Unit, seriously undermines the Employer's and Intervenor's assertion that a unit limited to LPNs at New Coleman Park is not appropriate.

Accordingly, inasmuch as I have found that the Employer and Intervenor have failed to rebut the presumptive appropriateness of the petitioned-for unit, I reject their contention that the petitioned-for employees have been accreted to the BHHC Unit and that the contract covering the BHHC Unit constitutes a bar to an election herein. *Passavant Retirement and Health Center*, supra.

C. Unit placement issues

The petition in the instant case requested a unit of all full-time and regular part-time LPNs and TRDs. At the hearing, the Petitioner clarified that it was seeking a technical unit. No party disputes that the LPNs are technical employees or claims that a unit of technical employees is inappropriate. Nor has any party claimed that there are any other technical employees employed at New Coleman Park, and the record does not reveal any other technical employees. Although both the Employer and the Intervenor objected to the inclusion of the TRDs in the petitioned-for unit, they failed to address the issue in their briefs, or otherwise explain their position.

The record establishes that there are two TRDs at New Coleman Park, Pamela Bing and Paula Chavez. Bing is the department head, and as department head she has the authority to effectively recommend the hiring of department employees. Petitioner does not seek her inclusion, and I find that she is properly excluded as a statutory supervisor. However, the record is devoid of evidence regarding Chavez's skills, duties, and licensing requirements.

Accordingly, I shall permit Paula Chavez to vote, subject to challenge, in the election directed herein.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time technical employees, including licensed practical nurses, but excluding all other employees, and guards, professional employees and supervisors [6] as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date: and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

[6] At the hearing and in its post-hearing brief, the Petitioner asserted that one LPN, MDS Coordinator Linda Morrell, should be excluded as a statutory supervisor or as a managerial employee. Neither the Employer nor the Intervenor took any position regarding Morrell either at the hearing or in their post-hearing briefs. As a result, the record contains no evidence concerning Morrell's alleged supervisory or managerial status. Under such circumstances, I shall permit Morrell to vote, subject to challenge, in the election directed herein.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by New England Heath Care Employees Union, District 1199,SEIU, AFL-CIO or Local 1522 of Council 4, AFSCME, AFL-CIO.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before March 24, 2005. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 31, 2005.

Dated at Hartford, Connecticut this 17th day of March, 2005.

/s/ Peter B. Hoffman

Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34